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No. 87-1279

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant

THEODORE B. OLSON, EDWARD C. SCHMULTS and CAROL E. DINKINS,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WHITNEY NORTH SEYMOUR, JR. INDEPENDENT COUNSEL, IN SUPPORT OF JURISDICTIONAL STATEMENT

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MOTION OF WHITNEY NORTH SEYMOUR, JR.,
INDEPENDENT COUNSEL,
FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Whitney North Seymour, Jr., Independent Counsel, respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorneys for all parties has been obtained, except the consent of the attorney for appellee Olson, which was

requested, but refused.*/

The interest of Independent Counsel, Whitney North Seymour, Jr., in this case arises from the fact that he was appointed Independent Counsel by the Special Division of the United States Court of Appeals on May 29, 1986, for purposes of investigating, and if warranted, prosecuting Michael K. Deaver, former White House Deputy Chief of Staff and Assistant to the President of the United States. Like appellant Morrison, this order is the sole basis for Independent Counsel's appointment, an offer of a "parallel

*/ Counsel for appellee Olson consents to the filing of an amicus curiae brief by Whitney North Seymour, Jr., on the merits, in the event the Court notes probable jurisdiction. Consent has been refused to the filing of the attached brief amicus curiae in support of the jurisdictional statement solely on the ground that expedited review of this matter reduces appellee's opportunity to respond.

appointment" as a Justice Department employee having been made after the investigative phase was completed, and having been declined.

Pursuant to the Special Division's order, Independent Counsel's investigation commenced in May 1986, and led to the filing by a grand jury on March 18, 1987, of a five-count indictment alleging that Deaver had committed perjury, in violation of 18 U.S.C. §§1621, 1623, in testimony before the grand jury and before a subcommittee of the House of Representatives. Trial of this indictment commenced on October 19, 1987 before the Honorable Thomas Penfield Jackson, United States District Judge, and a jury. On December 16, 1987, the jury returned verdicts of guilty on three counts of the indictment, and acquitted Deaver on two counts.

Prior to sentencing in the District Court, the decision in In Re: Sealed Case, Misc. Nos. 87-5261, 87-5264, and 87-5265 (D.C. Cir. Jan. 22, 1988), was announced. Deaver immediately moved the District Court to vacate the jury verdict and dismiss the indictment, which Independent Counsel opposed. The District Court then, sua sponte, stayed all proceedings in the case pending review of the In Re: Sealed Case decision.

Independent Counsel seeks leave to present the attached brief amicus curiae in order to:

(1) emphasize the urgency of a resolution of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-98, particularly in view of the pending criminal case, in which an accused's guilt has been established by a jury verdict, but in which no sentence has been imposed, no judgment has been entered, and further proceedings have been stayed;

(2) to support the constitutionality of these provisions and thereby add to the completeness of the defense of the challenged statute; and

(3) to respond to the erroneous statements in the decision under review concerning the operation and functioning of an independent counsel.

Respecfully submitted,

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February 18, 1988

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BRIEF OF WHITNEY NORTH SEYMOUR, JR. AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

Amicus curiae Whitney North Seymour, Jr., was appointed Independent Counsel on May 29, 1986, pursuant to 28 U.S.C. §592 (c)(1), for purposes of investigating, and, if warranted, prosecuting Michael K. Deaver, former White House Deputy Chief

of Staff and Assistant to the President of the United States. This appointment was made in response to widespread public concern over whether Mr. Deaver's conduct, following his departure from the White House to found a Washington, D.C. lobbying firm, violated the Ethics in Government Act, 18 U.S.C. §207.

This concern led five members of the United States Senate to write to the Attorney General, on April 23, 1986, requesting the appointment of an independent counsel. 28 U.S.C. §595(e). Two days later, on April 25, 1986, the Office of Government Ethics wrote the Attorney General advising him that its own investigation suggested that Deaver had violated the law. On May 10, 1986, the Government Accounting Office expressed its belief that Deaver's activities might have been unlawful. On April 28, 1986,

through his counsel, Deaver himself requested the Attorney General to appoint independent counsel.

On May 22, 1986, pursuant to 28 U.S.C. §592(c)(1), Deputy Attorney General D. Lowell Jensen moved a Division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel in the Deaver matter. The application was submitted by the Deputy Attorney General because the Attorney General had recused himself from the matter. See 28 U.S.C. §591(c). The application set forth the recommended subject matter of independent counsel's jurisdiction, and on May 29, 1986, the Special Division appointed Whitney North Seymour, Jr., as independent counsel in an order conferring upon him jurisdiction tracking the Deputy

Attorney General's request.[1]

Following an unsuccessful pre-indictment challenge by Deaver to the constitutionality of the independent counsel statute,[2] the grand jury returned an indictment on March 18, 1987, in five counts, which charged Deaver with perjury, in violation of 18 U.S.C. §§1621, 1623.[3]

[1] In March 1987, Independent Counsel was offered a "parallel appointment" as a Justice Department employee. See 52 Fed. Reg. 7270 (1987). The offer was declined.

[2] Deaver v. Seymour, 656 F. Supp. 900, 902 n.3 (D.D.C. 1987), aff'd, 822 F.2d 66 (D.C. Cir. 1987), stay denied, 55 U.S.L.W. §641 (U.S. March 18, 1987).

[3] Three counts of the indictment alleged that Deaver perjured himself during his voluntary appearance before the grand jury. Two counts alleged that Deaver committed perjury when he testified on May 16, 1986, before the Subcommittee on Oversight and Investigations of the House Committee on Commerce and Energy. On August 12, 1986, pursuant to a unanimous determination of the Subcommittee, its chairman, Rep. John D. Dingell referred to Independent Counsel the question whether Deaver had committed perjury before the subcommittee.

Trial of this indictment commenced before the Honorable Thomas Penfield Jackson, United States District Judge, and a jury on October 19, 1987. On December 16, 1987, the jury returned a verdict of guilt on three counts of the indictment, and acquitted Deaver on two counts.

While awaiting sentencing, which was scheduled for February 25, 1988, a panel of the United States Court of Appeals for the District of Columbia Circuit held the independent counsel provisions of the Ethics in Government Act unconstitutional. In Re: Sealed Case, Misc. Nos. 87-5261, 87-5264 and 87-5265 (D.C. Cir. January 22, 1988).

On the authority of that decision, on January 22, 1988, Deaver moved in the District Court to vacate the verdicts of guilt and for dismissal of his convic-

tion. Independent Counsel opposed the motion, and on February 2, 1988, sua sponte, Judge Jackson stayed all proceedings in the case pending review of the In Re: Sealed Case decision.

Independent Counsel Seymour submits this brief in order to emphasize the urgency of the need for review of the In Re: Sealed Case decision, and resolution of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-98. The urgency is heightened by the current posture of the Deaver case in the District Court, where a jury verdict of guilt has been returned, yet no sentence has been imposed, no judgment of conviction has been entered, and all proceedings have been stayed.

Second, this brief is submitted to enhance the completeness of the defense

of the challenged statute.

Third, this brief responds to the erroneous statements contained in the panel decision concerning the operation and functions of an independent counsel.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL 4/

The decision of the panel of the Court of Appeals in this case, issued over strong dissent, is the first judicial decision to hold the independent counsel provisions of the Ethics in Government Act unconstitutional, after an

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4/ Independent Counsel Seymour agrees with petitioner's request that this Court regard this case as a direct appeal, pursuant to 28 U.S.C. §1252. Should the Court decide, however, that 28 U.S.C. §1252 is not applicable, Independent Counsel Seymour submits that the issues presented herein are of exceptional importance and justify this Court's exercise of its certiorari jurisdiction and expedited consideration on the merits.

unbroken line of decisions upholding their constitutionality.[5/]

The panel decision is inconsistent with well-established precedents of this Court. Therefore, review is required, and, indeed, is urgently needed to resolve the constitutionality of the institution of independent counsel.

Point One

THE INDEPENDENT COUNSEL STATUTE IS A RESTRAINED AND CONSTITUTIONALLY CORRECT RESPONSE TO THE PROBLEM OF CONFLICT OF INTEREST IN THE EXECUTIVE BRANCH

The independent counsel provisions arose from a legislative determination,

5/ See In re Olson, 818 F.2d 34, 43 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987); North v. Walsh, 656 F. Supp. 414, 420 n.9 (D.D.C. 1987), aff'd on other grounds, No. 87-5058 (D.C. Cir. Oct. 1, 1987), petition for cert. pending, No. 87-1094; Deaver v. Seymour, 656 F. Supp. 900, 902 n.3 (D.D.C. 1987), aff'd on other grounds, 822 F.2d 66 (D.C. Cir. 1987), stay denied, 55 U.S.L.W. 3641 (U.S. March 18, 1987); Banzhaf v. Smith, 588 F. Supp. 1498, 1504-08 (D.D.C.), vacated on other grounds, 737 F.2d 1167 (D.C. Cir. 1984) (en banc).

following "Watergate," that there was a critical "need for a special prosecutor to handle cases where the Attorney General has a conflict of interest." H.R. Rep. No. 1307, 95th Cong., 2d Sess. (1978) (emphasis added). Legislation aimed at establishing a special prosecutor was actively considered in the 93rd, 94th, and 95th Congresses, before the Act was passed. During that period, the firm view of Congress was "not... whether a special prosecutor might at some time be appropriate. Rather the issue [was] what sort of process should be relied upon to put a special prosecutor into place whenever it is necessary to have one." Id. Moreover, the Act's history demonstrates that the constitutional considerations at issue now were extensively and carefully considered

during the legislative process, and that it was clear then,[6] as it is now,[7] that

[6] The following distinguished constitutional law scholars expressed support for the constitutionality of the Ethics in Government Act prior to its passage: Professors Paul Freund, Archibald Cox, Philip B. Kurland, Raoul Berger, and Laurence Tribe. See Hearings on Special Prosecutor before the Senate Committee on the Judiciary, 93d Cong., 1st Sess. (1973). These scholars filed an amicus brief in support of the statute in the proceedings below. See also Berger, "The Prosecutor," N.Y. Times, Nov. 7, 1983 at 47 col.5 ("[t]he power of appointment and the separation of powers were not designed to obstruct justice"). Moreover, the American Bar Association and the Association of the Bar of the City of New York supported the constitutionality of the Act, following careful study by special committees. See statement of Herbert S. Miller on behalf of the ABA before the Senate Subcommittee on Governmental Affairs on the subject of the Special Prosecutor Provision of the Ethics in Government Act (May 20, 1981); see also "The Special Prosecutor Provision of the Ethics in Government Act of 1978," A Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York (May 1981).

[7] See Briefs of Amici Curiae filed in the Court of Appeals in support of Independent Counsel Morrison's position in this case. Administrations of both political parties have acknowledged the constitutional validity of the independent counsel provisions, in congressional testimony and through use of the

the great weight of authority supports the constitutionality of the Act.

The panel decision holds that the statute in question profoundly alters the structure of our constitutional form of government. However, on reflection, it is clear that the independent counsel provisions of the statute are exceedingly

(cont.)

statute. The Justice Department never opposed the statute's constitutionality until the appeal below. See also Testimony of Assistant Attorney General John Harmon before Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess. (1977) at 16 (judicial appointment of a special prosecutor is constitutional in view of extraordinary circumstances); Testimony of Associate Attorney General Rudolph W. Guiliani before Senate Subcommittee on Oversight of Government Management on S. 2059, 97th Cong., 2d Sess. (1982) at 17 (while Department has serious concern about constitutionality of present law, these are substantially ameliorated by pending bill). As the Supreme Court has noted, a claim of interference with a branch of government is less viable if that branch has expressed its agreement with the particular law. Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977).

narrow in their scope, and seek to address a very specialized range of problems. They apply only in situations involving specified high government officials, 28 U.S.C. §591(b), or in situations in which the Attorney General determines that neither he nor the Justice Department can investigate because of the potential for a "personal, financial, or political conflict of interest." 28 U.S.C. §591(c).

The issue of conflict is not merely theoretical. In the Deaver matter, the application for appointment of independent counsel was submitted to the Special Division by the Deputy Attorney General expressly because the Attorney General had recused himself. Hence, the statute only comes into play when there is a genuine risk that an actual or potential conflict of interest disables the

Attorney General and the Justice Department from going forward. As we develop more fully below, these provisions are consistent with the constitutional principles announced in the decisions of this Court, and they by no means constitute the sharp break with history and precedent that the panel decision suggests they do.

Point Two

THE FUNCTIONING OF INDEPENDENT COUNSEL DOES NOT INVADE EXECUTIVE AUTHORITY OR JEOPARDIZE INDIVIDUAL LIBERTY

In addition to finding specific constitutional defects stemming from judicial appointment and restrictions on executive removal power,[8/] the panel majority held that the independent

[8/] Because we believe the specific issues concerning the appointment and removal power are adequately briefed by the parties and other amici, we confine our brief to the issues particularly within the competence of the first Independent Counsel to obtain an indictment and conviction after trial.

counsel statute "as a whole...so deeply invades the President's executive responsibilities and so jeopardizes individual liberty as to be unconstitutional." (Slip Op. 74). This erroneous conclusion is based on a misreading of the statute and unsupported speculation about the actual functioning of an independent counsel.

A. Executive Prerogatives Are Not Invaded By The Independent Counsel Statute

Under the Act, the Special Division has authority to appoint an independent counsel in two ways. First, if the Attorney General has received information concerning one or more persons within the specified category of high-ranking officials, and the information indicates a possible criminal violation, the Attorney General has no obligation under the statute unless he determines, based on the specificity and credibility of the information, that further investigation is

appropriate. Upon completion of any such preliminary investigation, the Attorney General is again under no obligation to apply for the appointment of independent counsel, unless he "finds reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. §592(c).

The second path toward appointment of independent counsel is entirely permissive. It comes into play only if the Attorney General determines that investigation by the Department of Justice may result in a conflict of interest, and the Attorney General receives information of a criminal violation sufficient to constitute grounds to investigate. If these preconditions are met, then the Attorney General "may conduct an investigation and apply for an independent counsel." Id. §591(c) (emphasis added).

Under either of these procedures, the Attorney General retains exclusive control over the decision to apply to the Court for appointment of independent counsel. The statute unequivocally states, with respect to the first alternative, that "[i]f the Attorney General ...finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, ... the court shall have no power to appoint independent counsel." Id., §592(b)(1) (emphasis added). The Attorney General's decision not to apply for independent counsel is unreviewable. Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (en banc); Nathan v. Smith, 737 F.2d 1069, 1077-82 (D.C. Cir. 1984) (Bork, J., concurring). Moreover, even if independent counsel is appointed, the

Attorney General retains authority to limit the counsel's jurisdiction, since the court is powerless to enlarge the counsel's jurisdiction over the Attorney General's contrary decision. In re Theodore Olson, 818 F.2d 34, at 47-48.

Since the second procedure for appointment of independent counsel is committed to the discretion of the Attorney General, it presents not even an arguable instance of diminution of executive control over the power to prosecute.

Furthermore, the 1982 amendments to the statute make clear that Congress expects the Attorney General's initial determination of whether further investigation or prosecution is warranted to be influenced by the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement." S. Rep. No. 496, 97th Cong., 2d Sess. 14

(1982). Thus, the statute does not seek to control the Attorney General's decision, nor limit his traditional exercise of discretionary decision-making. Indeed, it specifically grants the Attorney General the unreviewable authority to determine, according to the Justice Department's customary standards, whether appointment of an independent counsel is warranted. A statutory scheme such as this cannot fairly be regarded as an unconstitutional invasion of the executive power over prosecutorial decision-making.

Under the statute, it is the Attorney General who makes the policy decision whether a prosecution should take place (if supported by the facts) at the time he decides to file his application with the Special Division. 28 U.S.C. §592(b)

(1)[9/] If he decides for policy reasons that he will not authorize such a prosecution, his option is not to file any application with the Special Division and then explain his reasons to the community. Under the statute, that decision is unreviewable. (Contrast Maj. Op. at p.72.) In that respect, his policy-making function is no different than it

[9/] By "policy decision," we mean the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement," which the statute contemplates will influence this decision.

In the Deaver matter, the application by the Deputy Attorney General expressly directs that the Independent Counsel shall prosecute any federal law violations supported by the evidence.

> It is recommended that the independent counsel's jurisdiction include investigative and prosecutive authority over the specific allegations described in Part II above. In addition, it is recommended that the independent counsel's jurisdiction include investigative and prosecutive authority over all other allegations presented in the three referrals, and over any related matters developed in the course of the independent counsel's investigation.

(Appl. p.6-7) (Emphasis added)

would be if he delegated only investigative responsibility to independent counsel, and reserved decision on whether to authorize prosecution until the investigation had been completed.[10/] The Independent Counsel's function as far as prosecution is concerned could be described as essentially a ministerial one: to review the legally-admissible evidence to determine if it will support a conviction, and, if so, to proceed. The statute expressly directs the Independent Counsel to follow the Department of Justice guidelines in performing this and

10/ When the Department of Justice refers cases to individual United States Attorneys prior to completion of the investigative phase, the policy question of whether to prosecute if the facts warrant is made at that point. The U.S. Attorney ordinarily does not report back for further instructions.

other functions. 28 U.S.C. §594(b). He or she is not permitted to operate capriciously or arbitrarily on his own. (Contrast Maj. Op. at p.72.)[11/]

The majority opinion erroneously asserts that under the statute the Attorney General has no effective power "to define, circumscribe, or supervise" the duties of the Independent Counsel. (Maj. Op. p.19.) In fact, the statutory directive to follow Departmental policies gives the Attorney General exactly the same power over the execution of the duties of the Independent Counsel that he has over every other prosecutor in the Department. The Attorney General sets

11/ The United States Department of Justice's "Principles of Federal Prosecution" are printed in booklet form and available to the public. In the Deaver matter, copies were distributed to every member of the legal staff in the early stages of the investigation.

the ground rules, and the prosecutors carry them out. When the Attorney General asks the Special Division to appoint Independent Counsel to prosecute, he delegates sufficient discretion (within the guidelines) to permit the Independent Counsel to carry out his or her assigned duties. He does not yield up the policy decision on whether to prosecute if sufficient evidence is developed -- that decision is made when the Attorney General decides to file the application for appointment of Independent Counsel, because at that point he has made the statutory determination that "further investigation or prosecution is warranted." 28 U.S.C. §592(c). Plainly, the policy-making phase is long past at the point the indictment is filed by the appointee carrying out the Attorney General's original decision. What remains is merely

the faithful discharge of an assigned duty.

While it is true that once appointed, independent counsel operates without day-to-day supervision of the Attorney General, the panel majority misunderstands our history when it asserts that the principle of separated powers cannot tolerate a federal prosecutor's limited independence from the Attorney General.[12/] The Judiciary Act of 1789, Ch.20, 1 Stat. 73, provided for the appointment

[12/] Of course, the "critical factor" limiting independent counsel's independence is, as this Court acknowledged in Bowsher v. Synar, 106 S. Ct. at 3188, the power to remove, which remains with the Attorney General. Inexplicably, the panel majority concluded that "in practical terms," the independent counsel's superior is the Special Division. This is simply a false and unsupported assertion. The "practical terms" of the functioning of amicus as independent counsel has involved no judicial supervision or interference whatsoever.

of both the Attorney General and an attorney in each federal district "to prosecute...all delinquents for [federal] crimes and offenses." The Attorney General, however, "had no formal control over the conduct of the local federal law enforcement officers." 3 Encyclopedia of Crime and Justice 1291 (S. Kadish, ed. 1983). Although proposals to give the Attorney General authority over "federal district attorneys," as they were then known, were introduced in Congress as early as 1791, legislation to achieve this objective was not enacted for another seventy years or more. Hence, "it was not until after Reconstruction and the creation of the Department of Justice in 1870 that the various prosecutors came under any meaningful national supervision." Id. See generally Cummings & McFarland, Federal Justice:

Chapters in the History of Justice and the Federal Executive (1937); Huston, The Department of Justice (1967); Schwartz, "Federal Criminal Jurisdiction and Prosecutor's Discretion," 13 Law & Contemporary Problems 64-87 (1948).

Viewed against this historical backdrop, the Attorney General actually exercises greater control over independent counsel, by virtue of his power over appointment, removal and the definition of jurisdiction, than attorneys general exercised over federal prosecutors for the first half of our republic's history. It is therefore difficult to accept the panel majority's view that the principle of separated powers cannot tolerate independent counsel's limited freedom from direct control by the Attorney General,

when the Framers tolerated a far greater degree of such independence.[13/]

B. Independent Counsel's Limited Independence Does Not Jeopardize Individual Liberties

Apparently on the basis of a comment made by counsel for one of the appellees at oral argument in the court of appeals, the panel majority was prompted to speculate that "independence from presidential

13/ An examination of the present-day relationship actually prevailing between the Attorney General and the United States Attorneys throughout the country similarly reveals considerable independence. "Whether because of history, the selection process, or sheer volume of business, the United States Attorney's daily operations remain largely free of control by officials in Washington, D.C... Although the department may announce broad priorities for federal law enforcement, each United States Attorney ultimately makes his own decisions about which cases to pursue and the resources to be allocated to particular enforcement efforts." 3 Encyclopedia of Crime and Justice, supra, at 1292 (emphasis added). See also Principles of Federal Prosecution, at 8 (Department of Justice 1980) ("Individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance."

and Justice Department supervision and guidance" jeopardizes individual liberty. (Slip Op. 70, 74).[14/] The threat to liberty, according to the panel majority, stems from two sources: (1) independent counsel's purportedly "unique incentives to seek an indictment," rather than decline prosecution, and (2) independent counsel's purported isolation from the "accumulated lore and wisdom" of career Justice Department prosecutors, which, it is argued, ordinarily operate as restraints on the decision to prosecute. (Slip Op. 70-72). Neither of these purported sources of unfairness are more

14/ Indeed, in this and similar passages (Slip Op. 73), the panel majority suggests that the target of a criminal investigation is constitutionally entitled to an institutional arrangement which will permit the very political influence over law enforcement that motivated passage of the independent counsel legislation, an attitude which could be viewed as a recipe for political corruption.

than an imagined threat to liberty, much less a source of constitutional infirmity.

The record of past independent counsels simply refutes the panel majority's fear that independent counsel is precon ditioned to prosecute. Until the Deaver investigation, every prior independent counsel terminated his investigation with a declination of prosecution, on grounds of evidentiary weakness or otherwise.[15/] Contrary to the panel majority's speculation that the nature of prosecutorial decision-making in a high-visibility,

15/ Four distinguished attorneys (Arthur H. Christy, Gerald J. Gallinghouse, Leon Silverman, and Jacob A. Stein) served as Independent Counsel prior to the appointment in the instant case of James McKay, and, upon his withdrawal due to potential conflict, Alexia Morrison. Each of the prior investigations resulted in a decision not to go forward with a criminal prosecution.

single case context intolerably encourages prosecution, the opposite of this conclusion could just as well be drawn. A prosecutor who "administer[s] the criminal law across a wide population" may be in a much better position to go forward in a marginal case, or one involving evidentiary or other weaknesses, precisely because "the success of the office" will not be measured by that one case. (Slip Op. 70-71). Independent counsel, on the other hand, is a prosecutor whose mission is essentially "to investigate and prosecute a single individual." Id. Since the effectiveness of the counsel's "office itself, in the public's eyes, at least, must turn to some extent upon whether indictment and conviction are obtained," id., there is actually a disincentive to going forward in all but the clearest, most certain cases. In other

words, the high-visibility, single case context instills caution, even reluctance, rather than the undue eagerness suggested by the panel majority.

Secondly, the panel majority's assumption that independent counsel is isolated from the reservoir of practical experience and long-range institutional perspective of the Justice Department is simply false. As we have already shown, supra, the initial decisions concerning appointment and jurisdiction are effectively within tne Attorney General's control. Moreover, development of the factual record relevant to the assertion of lack of experience and perspective would reveal that independent counsel's offices are extensively staffed by former Justice Department employees who cut their teeth as lawyers in the institutional setting the panel majority regards

as so important to fairness in prosecutorial decision-making. Moreover, this factual record would also show, in the Deaver case, extensive and valuable assistance provided independent counsel by the Justice Department and the United States Attorney's Office for the District of Columbia.

Finally, it is difficult to perceive the unconstitutional unfairness that inures to persons "who find themselves the target of independent counsel's attentions,"[16/] since such persons are protected by all of the constitutional and statutory limits on the power to investigate and prosecute that apply in any criminal case.

In sum, the panel majority's conclu-

16/ We cannot help but note in passing that this does not apply to Mr. Deaver, who urged the appointment of independent counsel and voluntarily testified before the grand jury, where he perjured himself, as a trial jury has found beyond reasonable doubt.

sion that the functioning of an independent counsel unconstitutionally threatens individual liberty is unpersuasive. Even if the "incentive to prosecute" or isolation from restraining institutional influences existed, which we submit they do not, these purported deficiencies in the statutory scheme might indicate its undesirability as policy: they would hardly rise to the level of depriving Congress of its lawful power to enact the legislation.

Conclusion

For all of the foregoing reasons, probable jurisdiction should be noted (or, in the alternative, a writ of certiorari should issue), and the case should

be set down for expedited consideration and determination on the merits.

Respectfully submitted,

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